In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 846

TEXTILE WORKERS UNION OF AMERICA, PETITIONER

v.

DARLINGTON MANUFACTURING COMPANY, DEERING MILLIKEN, INC., DEERING, MILLIKEN & COMPANY, INC., AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This petition for certiorari involves the same judgment as the Board is seeking to have reviewed in *National Labor Relations Board* v. *Darlington Manufacturing Company, et al.*, No. 874, this Term. Petitioner was the charging party before the Board, and it was a party to the proceedings in the court of appeals.

The Board found that Darlington and Deering Milliken constituted a single employer for purposes of the National Labor Relations Act, and that they violated Sections 8(a)(3), (1) and (5) of the Act by permanently shutting down the Darlington mill in

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order to discourage the employees' union activity and in order to avoid bargaining with petitioner Textile Workers' Union (J.A. 7–19, 23–27).[1] The Board, *inter alia*, ordered that the discharged employees be offered employment or placement on a preferential hiring list at other Deering Milliken mills in South Carolina or adjacent States, and that they be given back pay from the date of the discrimination until they are employed or placed on a preferential hiring list at the other Deering Milliken mills, or obtain substantially equivalent employment elsewhere (J.A. 20–23, 27–28). The Board, however, dismissed—on the ground that the underlying charge was insufficient—a complaint issued against Roger Milliken as an individual; he is the president of both Darlington and Deering Milliken and played a leading role in the decision to shut down the plant (J.A. 29–30).

Darlington and Deering Milliken filed a petition to review the Board's order against them; the Board filed a cross-petition to enforce that order; and the Union sought review of the Board's action in dismissing the complaint as to Roger Milliken as an individual, and in failing to require the reopening of a plant in Darlington, South Carolina.[2] The court of appeals (in an *en banc* decision, two judges dissenting) set aside the Board's order against Darlington and Deering Milliken on the ground that, even if they be viewed as a single employer, the closing of the Darlington plant, since it was "permanent", did not

[1] "J.A." refers to the joint appendix filed in the court of appeals.

[2] The Union was also permitted to intervene in the proceeding brought by Darlington and Deering Milliken.

constitute an unfair labor practice (Pet. 8a–13a). The court also held that the relief sought in the Union's petition to review "is, obviously, denied by our acquittal of Darlington of liability" (Pet. 13a).

The first question presented by this petition (Pet. 2) encompasses two distinct issues. The first (which assumes that Darlington and Deering Milliken are a single employer) is whether an employer violates the Act when he shuts down one of his plants in order to avoid dealing with the union and to punish his employees for selecting the union. This is the same issue presented in question 1 of the Board's petition in No. 874, and we therefore do not oppose granting the instant petition in that respect. The second issue (which assumes that Darlington alone is the employer) is whether an employer violates the Act when he goes out of business entirely to avoid dealing with the union. This issue is not presented for, although it was an alternate basis for the Board's decision (J.A. 9–18), the court below decided the case on the assumption that Darlington and Deering Milliken constituted a single employer (see Board's petition, p. 2, n. 2). Accordingly, the petition should be denied insofar as it raises this second issue.

The second question (Pet. 2–3) relates to the propriety of the Board's remedial order in this case. Since this is substantially the same issue presented in question 2 of the Board's petition, we do not oppose granting the instant petition in that respect.[3]

[3] It may be noted, however, that petitioner is contending that the Board remedy should have gone further, i.e., ordered the reopening of a Darlington plant (Pet. 19).

The third question (Pet. 3) challenges the Board's action in dismissing the complaint against Roger Milliken as an individual. The Board dismissed this portion of the complaint on the ground that, since the charge referred to "Roger Milliken, President," he was not given sufficient notice that he was sought to be held individually liable for the unfair labor practices found (J.A. 29–30). Since this holding turns on the facts of the particular case, it is not of sufficient importance to warrant review by this Court. Accordingly, the petition should be denied in that respect.

For the reasons stated, we do not oppose granting this petition to the extent indicated above.

Respectfully submitted,

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